Chong Kok Weng & Anor (both as joint administrator and administratrix of the estate of Chong Kit Yin and Chung Mui Lim, decd) v Wing Wah Travel Agency Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUITS NOS P531/81 AND P532/81
ABDUL AZIZ JCA
15 JANUARY 2003

Civil Law Act *— Damages — Claim for damages — Deceased couple bought a full package group tour from first defendant — Deceased stayed in different hotel due to absence of reception for deceased couple at airport — Couple died due to coal briquet carbon monoxide gas poisoning in hotel room — Whether defendants liable — Civil Law Act 1965 ss 7, 8*

Contract *— Breach — Exemption clause — Deceased couple bought a full package group tour from first defendant — Deceased stayed in different hotel due to absence of reception for deceased couple at airport — Couple died due to coal briquet carbon monoxide gas poisoning in hotel room — Whether absence of reception for deceased couple was beyond first defendant's control — Whether exemption clause applied to render first defendant not liable*

Tort *— Negligence — Duty of care — Deceased couple bought a full package group tour from first defendant — Deceased stayed in different hotel due to absence of reception for deceased couple at airport — Couple died due to coal briquet carbon monoxide gas poisoning in hotel room — Whether first defendant answerable for delay in flight — Whether first defendant knew or could not have known that hotel was not safe for accommodation — Whether first defendant had done all that was reasonable to ensure that deceased couple was met on arrival — Whether case of negligence against first defendant could succeed — Whether deaths of couple a reasonably foreseeable consequence of breach*

Tort *— Negligence — Duty of care — Employees of airline company brought deceased couple to hotel after tour agent failed to meet couple — Couple died due to coal briquet carbon monoxide gas poisoning in hotel room — Whether employees of airline company owed duty of care to deceased couple to ensure that they were accommodated at a safe place*

Chong Kit Yin and Chung Mui Lim ('the deceased couple') bought a full package group tour from the first defendant ('Wing Wah'). The second defendant ('Korean Airlines') provided them air carriage from Tokyo to Seoul, where they met their deaths. The tour group of 23 people (including the deceased couple), was originally booked on Korean Airlines' flight KE 704, scheduled to arrive at Seoul at 3.40pm on 15 October 1978. There was a change of flight to flight KE 001, which was scheduled to arrive at Seoul at 7.30pm on the same day. Wing Wah arranged for the tour group's accomodation at the Sheraton Walker Hill Hotel ('the Sheraton') in Seoul. Wing Wah's ground agent in Seoul for the group was Lotte Travel Service Ltd ('Lotte'). On 3 October 1978, Wing Wah wrote to Lotte to inform them that the tour group would be travelling from Tokyo to Seoul on 15 October 1978 on KE 001, instead of KE 704. The message, which

was air-mailed and postmarked 4 October 1978, was not received by Lotte on time. Not having received information about the change of flight to KE 001, Ms Woo was sent by Lotte to welcome the tour group at Seoul's Kimpo Airport at 3.40pm and to transport the group to the Sheraton. When the tour group did not arrive on KE 704, Mr Wu of Lotte made enquiries with Korean Airlines in Seoul about the group but was informed that the group was also not on flight KE 001. Mr Wu also attempted to communicate by telephone with Wing Wah in Kuala Lumpur but was not successful. Ms Woo susequently left the airport. The tour group finally arrived at the airport at about 8.26pm on flight KE 001. Mr Kim, the supervisor in the departure hall at Kimpo Airport brought the tour group to a restaurant and subsequently found an inn ('the Eun-ha Inn') in which the tour group could stay the night. Meanwhile, Mr Wu was informed that the tour group had arrived. Mr Wu drove the coach to meet the tour group but could not find anyone. The curfew in Seoul had started by then and Mr Wu could only commence to search for the tour group at 4am when the curfew ended, but to no avail. On the following morning, four persons were found unconscious in a room at the Eun-ha Inn with symptoms of gas intoxication. Two of the four persons were the deceased couple. The cause of their deaths was certified to be coal briquet carbon monoxide gas poisoning. These two actions were brought under ss 7 and 8 of the Civil Law Act 1956 against Wing Wah and Korean Airlines by the joint administrator and administratrix of the estates of the deceased couple to recover damages arising from their deaths. The causes of action against Wing Wah were breach of contract and negligence, and against Korean Airlines was negligence. The plaintiffs argued that Wing Wah committed two breaches of contract. One was in the belated arrival of flight KE 001 in Seoul at 8.26pm instead of at 7.30pm as scheduled. The second breach was the absence of reception for the deceased couple at the airport and in accommodating them at the Eun-ha Inn. Further, the plaintiffs alleged that Wing Wah had breached its duty of care to the deceased couple in: (a) failing to ensure that the deceased couple arrived in Seoul at 3.20pm; (b) in causing them to arrive at 8.26pm without proper arrangement being made for their accommodation in Seoul; (c) causing them to be accommodated at the Eun-ha Inn which Wing Wah knew or ought to have known was not safe for accommodation; and (d) failing to make adequate arrangements with Lotte to ensure the deceased couple were met on arrival in Seoul and transported to the Sheraton. The plaintiffs did not call any witnesses to testify as to the happenings in the night between 15 and 16 October 1978 and instead sought to rely on three reports, P4, P5 and P9. P4 was the report to the Malaysian Ministry of Foreign Affairs from the Third Secretary, Administration and Consular ('Mohd Noor Hashim') at the Malaysian Embassy in Seoul, P5 was Lotte's statement to the Malaysian Embassy and P9 was a report from Wing Wah's tour leader. The plaintiffs also produced P7, which was a letter from Mohd

Noor Hashim to the Malaysian Ministry of Foreign Affairs forwarding, among other things, a copy of the police report from the Kangso-gu Police Station, the passports and personal effects of the deceased couple. The police report contained information about the cause of the presence of carbon monoxide in the inn. It appeared that the operators of the Eun-ha Inn had had the heating system of the room in question changed from roller style coal briquet fireplace to hot water circulation style, but the finishing work that had to be done to the room after the change had been of an inferior quality so that, in the cement finishing beside a water tank and at both sides of a window, there were cracks through which carbon monoxide gas seeped into the room. Wing Wah's holiday brochure contained a clause exempting Wing Wah from liability '... for any injury, damage, loss, additional expenses, accidental delay or other irregularity which may be caused either through wilful or negligent acts or commission on the part of companies or individuals providing or engaged in transportation, accommodation or other services relating to the execution of the tour or through natural calamities or Government Regulations, strikes and other factors beyond its control'.

Held, dismissing the plaintiffs' claims:

(1) The reports and the letters relied on by the plaintiffs were hearsay, in that they were statements or based on statements of persons who did not appear and testify. Therefore, they were inadmissible as evidence (see p 561E).

(2) Nowhere in their written submission did the plaintiffs expressly say that Korean Airlines owed a duty of care to the deceased couple to transport them to the Sheraton. The plaintiffs' argument was that even if Korean Airlines's employees did not know that the tour group was to be accommodated at the Sheraton, their conduct in waiting at the restaurant with the tour group, in searching for accommodation and in eventually housing the members of the tour group at the Eun-ha Inn suggested an undertaking by those employees to act in the best interests of the deceased couple. The plaintiffs therefore concluded that those employees of Korean Airlines owed a duty of care to the deceased couple to ensure that they were accommodated at a place that was safe for habitation. The corollary was that if those employees had left the group to their fate at the restaurant, they would have owed no duty of care to the deceased couple. To find that a duty of care arose in such circumstances was to propose that the greater the length one would go to in endeavouring to help someone, the greater was one's duty of care to ensure, as a matter of undertaking, that the help given ended in safety. No authority had been cited for such a proposition but in any case, it did not strike the court as a correct proposition. It was unacceptable because it would discourage the rendering of succour to those in distress (see p 562C–F).

(3) The plaintiffs claimed that the breach in such duty of care laid in the employees of Korean Airlines accommodating the deceased at the Eun-ha Inn when they knew or should have known that it was not safe for accommodation. There was no evidence that those employees knew or should have known that it was not a safe accommodation. On the contrary, the evidence of the police report as to the cause of the presence of carbon monoxide in the fateful room was prima facie proof that those employees could not have known that there was or was going to be presence of carbon monoxide in one of the rooms of the inn. In fact, there was evidence that those employees themselves would have stayed at the inn too had there been any more room to accommodate them (see p 562F–H).

(4) Accordingly, the plaintiffs had not proven that the Korean Airlines' employees owed the duty of care to the deceased couple but even if they did owe such a duty of care, they had not breached it. Therefore, it followed that the plaintiffs had failed to prove their case against Korean Airlines (see pp 562H–563A).

(5) The factors that operated to prevent Lotte meeting the tour group at the airport, namely the non-receipt in time of Wing Wah's communication about the change of flight and Mr Wu's being informed by KAL that the group was not on flight KE 001 were factors beyond Wing Wah's control and the exemption clause applied to render them not liable for the consequences thereof on the deceased couple. As for the delay in flight KE 001, Wing Wah clearly cannot be liable for it because, according to the exemption clause, it was a circumstance beyond their control. For those reasons, the plaintiffs failed against Wing Wah on breach of contract (see pp 564I–565A, D–E, G).

(6) The original flight KE 704 had been changed to KE 001 before the tour started. Any delay in the flight should not be answerable for by Wing Wah because they had no control over flights and flight operation. As for the accommodation, proper arrangements had been made for accommodation at the Sheraton. Wing Wah and its tour leader did not know or could not have known that the Eun-ha Inn was not safe for accommodation. The evidence was that Wing Wah had done all that was reasonable to ensure that the deceased couple were met on arrival, but their letter informing Lotte of the change of flight was not received by Lotte before the event. Accordingly, the case of negligence against Wing Wah must fail. Even if there was a breach of duty of care on their part, the deaths of the deceased couple were not a reasonably foreseeable consequence of the breach (see pp 565H–566D, F).

[Bahasa Malaysia summary

Chong Kit Yin dan Chung Mui Lim ('pasangan mendiang') telah membeli pakej pelancongan berkumpulan daripada defendan pertama

('Wing Wah'). Defendan kedua ('Penerbangan Korea') membekalkan pengangkutan penerbangan udara dari Tokyo ke Seoul, di mana mereka menemui ajal mereka. Kumpulan pelancongan yang terdiri daripada 23 orang, termasuk pasangan mendiang, asalnya ditempah menaiki Penerbangan Korea KE 704, yang dijadualkan tiba di Seoul pada 15 Oktober 1978 jam 3.40pm. Pengangkutan telah ditukar kepada penerbangan KE 001, yang dijadualkan tiba di Seoul pada hari yang sama jam 7.30pm. Wing Wah telah membuat penempahan bagi penginapan kumpulan pelancongan tersebut di Hotel Sheraton Walker Hill ('Hotel Sheraton') di Seoul. Agen daratan Wing Wah di Seoul bagi kumpulan tersebut adalah Lotte Travel Service Ltd ('Lotte'). Pada 3 Oktober 1978, Wing Wah telah memutuskan surat kepada Lotte memberitahu Lotte bahawa kumpulan pelancongan tersebut akan bertolak dari Tokyo ke Seoul pada 15 Oktober 1978 di atas KE 001, dan bukannya KE 704. Utusan yang di hantar secara pos udara itu dan dicap pos 4 Oktober 1978, tidak sempat diterima oleh Lotte. Oleh kerana tidak sempat menerima maklumat tentang perubahan penerbangan ke KE 001, Lotte telah menghantar Cik Woo untuk menyambut kumpulan pelancongan di Lapangan Terbang Kimpo di Seoul pada pukul 3.40pm dan untuk membawa kumpulan tersebut ke Hotel Sheraton. Apabila kumpulan pelancongan tersebut tidak tiba dengan penerbangan KE 704, En Wu dari Lotte telah bertanya dengan Penerbangan Korea di Seoul tentang kumpulan tersebut tetapi beliau diberitahu bahawa kumpulan tesebut tidak juga dijadualkan tiba dengan penerbangan KE 001. Encik Wu juga telah cuba berhubung dengan Wing Wah di Kuala Lumpur melalui telefon tetapi tidak berjaya. Cik Woo seterusnya telah meninggalkan lapangan terbang. Kumpulan pelancongan telah tiba dengan Penerbangan KE 001 pada jam 8.26pm. Encik Kim, penyelia di dewan pelepasan di Lapangan Terbang Kimpo telah membawa kumpulan pelancongan tersebut ke sebuah restoran dan seterusnya mencarikan penginapan di sebuah rumah penginapan ('Eun-ha Inn') di mana kumpulan pelancongan itu dapat bermalam. Sementara itu, En Wu telah diberitahu bahawa kumpulan pelancongan itu telah tiba. Encik Wu telah memandu bas untuk menyambut kumpulan pelancongan tersebut tetapi tidak dapat mengesan sesiapa. Perintah berkurung di Seoul telah bermula pada masa itu dan En Wu hanya dapat meneruskan pencariannya pada pukul 4am apabilah perintah berkurung itu tamat, tetapi masih tidak berjaya. Pagi seterusnya empat orang telah ditemui dalam keadaan tidak sedar diri di dalam sebuah bilik di Eun-ha Inn dengan tanda kemabukan gas Dua daripada empat orang tersebut adalah pasangan mendiang. Punca kematian mereka disahkan akibat diracun gas karbon monoksida arang briket. Kedua-dua tindakan ini telah dibawa di bawah ss 7 dan 8 Akta Undang-Undang Sivil 1956 terhadap Wing Wah dan Penerbangan Korea oleh pentadbir bersama harta pusaka pasangan mendiang bagi menuntut ganti rugi yang timbul akibat kematian mereka. Kausa tindakan terhadap Wing Wah adalah bagi pemungkiran kontrak dan kecuaian, dan terhadap Penerbangan

A B C D E F G H I

A Korea bagi kecuaian. Plaintif-plaintif menyatakan bahawa Wing Wah melakukan dua kemungkiran kontrak. Satu kerana penerbangan KE 001 yang lambat tiba di Seoul pada jam 8.26pm dan bukannya pada jam 7.30pm seperti dijadualkan. Kemungkiran kedua adalah kerana pasangan mendiang tidak disambut di lapangan terbang dan juga kerana mereka ditempatkan di Eun-ha Inn. B Seterusnya, plaintif-plaintif mendakwa Wing Wah telah memungkiri kewajipan berjaga-jaga terhadap pasangan mendiang kerana: (a) gagal untuk memastikan pasangan mendiang tiba di Seoul pada jam 3.20pm; (b) mengakibatkan ketibaan mereka pada jam 8.26pm tanpa sebarang perancangan betul untuk penginapan mereka di Seoul; (c) mengakibatkan mereka ditempatkan di Eun-ha Inn yang C Wing Wah mengetahui atau harus mengetahui tidak selamat untuk penginapan; dan (d) kegagalan untuk membuat perancangan dengan Lotte untuk memastikan pasangan mendiang disambut semasa ketibaan mereka di Seoul dan dibawa ke Hotel Sheraton. Plaintif-plaintif tidak memanggil sebarang saksi untuk memberi keterangan ke D atas kejadian-kejadian di malam antara 15 dan 16 Oktober 1978 dan sebaliknya bergantung kepada tiga laporan, P4, P5 dan P9. P4 adalah laporan Kementerian Hal-Ehwal Luar Negara Malaysia daripada Setiausaha Ketiga, Pentadbiran dan Konsular ('Mohd Noor Hashim') di Kedutaan Malaysia di Seoul, P5 adalah kenyataan Lotte kepada Kedutaan Malaysia dan P9 adalah laporan ketua pelancongan Wing E Wah. Plaintif-plaintif juga mengemukakan P7, yang merupakan surat dari Mohd Noor Hashim kapada Kementerian Hal-Ehwal Luar Negara Malaysia menghantar, antara lain, salinan laporan polis dari Stesen Polis Kangso-gu, paspot-paspot dan barangan peribadi pasangan mendiang. Laporan polis mengandungi maklumat mengenai punca kehadiran karbon monoksida di dalam Eun-ha Inn. F Didapati pengusaha Eun-ha Inn telah menukarkan sistem pemanasan bilik tersebut dari 'roller style coal briquet' kepada sistem pengedaran air panas, tetapi kerja kemasan yang perlu dilakukan pada bilik tersebut selepas penukaran ini tidak dilakukan dengan baik mengakibatkan di kemasan simen sebelah tangki air dan pada kedua-G dua bahagian tingkap terdapat rekahan yang membolehkan gas karbon monoksida meresap masuk ke dalam bilik itu. Risalah percutian Wing Wah mengandungi klausa yang mengecualikan Wing Wah daripada tanggungjawab '... for any injury, damage, loss, additional expenses, accidental delay or other irregularity which may be caused either through wilful or negligent acts or commission on the H part of companies or individuals providing or engaged in transportation, accommodation or other services relating to the execution of the tour or through natural calamities or Government Regulations, strikes and other factors beyond its control'.

I **Diputuskan,** menolak tuntutan plaintif-plaintif:

(1) Laporan-laporan serta surat-surat yang plaintif bergantung kepada merupakan dengar cakap, memandangkan ianya kenyataan

ataupun berdasarkan kenyataan orang yang tidak datang dan memberi keterangan. Oleh itu, ianya tidak boleh digunakan sebagai keterangan (lihat ms 561E). A

(2) Tiada sebarang pernyataan dalam penghujahan bertulis plaintif-plaintif yang menyatakan bahawa Penerbangan Korea mempunyai kewajipan berjaga-jaga terhadap pasangan mendiang untuk membawa mereka ke Hotel Sheraton. Penghujahan plaintif-plaintif bahawa walaupun pekerja Penerbangan Korea tidak sedar bahawa kumpulan pelancongan itu sepatutnya menginap di Hotel Sheraton, kelakuan mereka menunggu di restoran dengan kumpulan pelancongan, mencari tempat penginapan dan seterusnya menempatkan mereka di Eun-ha Inn menunjukkan satu usaha yang dilakukan untuk kepentingan pasangan mendiang. Plaintif-plaintif seterusnya membuat kesimpulan bahawa pekerja Penerbangan Korea mempunyai kewajipan berjaga-jaga terhadap pasangan mendiang untuk memastikan mereka ditempatkan di satu tempat yang selamat. Seterusnya jika pekerja penerbangan tersebut telah meninggalkan kumpulan itu di restoran tersebut, mereka tidak mempunyai kewajipan berjaga-jaga kepada pasangan mendiang. Untuk mendapati satu kewajipan berjaga-jaga wujud dalam keadaan sebegini adalah untuk mengesyorkan bahawa selebih seseorang cuba membantu seseorang yang lain, begitu tingginya kewajipan berjaga-jaganya untuk memastikan bahawa, sebagai perkara akujanji, bantuan yang dihulurkan itu berakhir dengan selamat. Tiada autoriti yang diberikan bagi proposi sebegini, malahan mahkamah tidak mendapati proposi ini betul. Ia tidak dapat diterima kerana ia menggalakkan supaya bantuan tidak diberi kepada mereka yang berada dalam kesukaran (lihat ms 562C–F). B C D E F

(3) Plaintif-plaintif mendakwa bahawa kemungkiran dalam kewajipan berjaga-jaga terletak pada pekerja Penerbangan Korea menempatkan pasangan itu di Eun-ha Inn memandangkan mereka tahu ataupun seharusnya tahu tempat itu tidak selamat dididuki. Tiada sebarang keterangan bahawa pekerja tersebut tahu ataupun harus tahu bahawa Eun-ha Inn bukan tempat penginapan yang selamat. Sebaliknya, keterangan laporan polis mengenai punca kehadiran karbon monoksida di bilik tersebut adalah bukti prima facie bahawa pekerja itu tidak tahu bahawa terdapat atau akan terdapat kehadiran karbon monoksida di sebuah bilik di rumah tumpangan itu. Malahan, terdapat keterangan bahawa pekerja penerbangan tersebut akan menginap di rumah tumpangan tersebut jikalau terdapat kekosongan bilik (lihat ms 562F–H). G H

(4) Seterusnya, plaintif-plaintif tidak membuktikan bahawa pekerja Penerbangan Korea mempunyai kewajipan berjaga-jaga terhadap pasangan mendiang, tetapi walaupun mereka mempunyai sebarang kewajipan berjaga-jaga, mereka tidak memungkirinya. I

A Oleh itu, plaintif telah gagal membuktikan kes terhadap Penerbangan Korea (lihat ms 562H–563A).

(5) Faktor-faktor yang menghalang Lotte daripada menyambut kumpulan pelancongan tersebut di lapangan terbang, terutamanya ketidakterimaan pada masa tepat komunikasi Wing Wah mengenai perubahan masa penerbangan dan En Wu B diberitahu oleh Penerbangan Korea bahawa kumpulan tersebut tidak berada di penerbangan KE 001 adalah faktor-faktor di luar kawalan Wing Wah dan klausa pengecualian terpakai untuk menjadikan mereka tidak bertanggungjawab ke atas akibat kepada pasangan mendiang. Bagi kelewatan penerbangan KE 001 pula, C adalah jelas Wing Wah tidak bertanggungjawab baginya kerana menurut klausa pengecualian, ia merupakan satu keadaan di luar kawalan mereka. Di atas sebab-sebab ini, plaintif telah gagal terhadap Wing Wah bagi pemungkiran kontrak (lihat ms 564I–565A, D–E, G)

(6) Penerbangan asal KE 704 telah ditukarkan kepada KE 001 D sebelum pelancongan tersebut bermula. Sebarang kelewatan pada penerbangan tersebut tidak boleh dipertanggungjawabkan kepada Wing Wah kerana mereka tidak ada kawalan terhadap penerbangan serta operasi penerbangan. Bagi penginapan pula, persediaan telah dibuat untuk penginapan di Hotel Sheraton. E Wing Wah serta ketua rombongan mereka tidak tahu atau tidak dapat tahu bahawa Eun-ha Inn tidak selamat untuk penginapan. Keterangan adalah bahawa Wing Wah telah melakukan segala yang munasabah untuk memastikan pasangan mendiang disambut semasa mereka tiba, tetapi surat mereka yang memberitahu Lotte mengenai perubahan dalam penerbangan F tidak sempat diterima oleh Lotte sebelum kejadian itu. Oleh itu, kes kecuaian terhadap Wing Wah mesti gagal. Walaupun jika terdapat kemungkiran kewajipan berjaga-jaga oleh Wing Wah, kematian pasangan tersebut bukan merupakan akibat kemungkiran yang dapat ditanggapkan secara munasabah (lihat ms 565H–566D, F).]

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Notes

For cases on claim for damages under the Civil Law Act, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue), para 2648.

For cases on exemption clauses, see 3 *Mallal's Digest* (4th Ed, 2000 H Reissue), para 2008.

For cases on duty of care, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue), paras 687-694.

Legislation referred to

I Civil Law Act 1956 ss 7, 8

Jagjit Singh (*Jagjit Singh & Co*) for the plaintiffs.

RD Rajasingam (*Premshangar Venugopal and Muralidharan Balan Pillai* with him) (*Lewis & Co*) for the first defendants. A

S Radhakrishnan (*Shanti Mogan* with him) (*Shearn Delamore & Co*) for the second defendants.

Abdul Aziz JCA: These two actions are brought under ss 7 and 8 of the Civil Law Act 1956 by the joint administrator and administratrix of the B Estates of Chong Kit Yin and Chung Mui Lim to recover damages arising from their deaths in Seoul on 16 October 1978 while on a full package group tour which they had bought from the first defendants ('Wing Wah'). It was a round tour which had taken them from Kuala Lumpur to Taipei, Hualien, Osaka and Tokyo. The second defendants ('KAL') provided them air carriage from Tokyo to Seoul, where they met their deaths, if not for C which their itinerary would have taken them next to Hong Kong and from there back to Kuala Lumpur. They were husband and wife, Chung Mui Lim being the wife. I shall refer to them as 'the deceased couple'.

As maintained by the end of the trial, the causes of action against Wing Wah are breach of contract and negligence and that against KAL is D negligence.

For the flight from Tokyo to Seoul, the tour group of 23, including the deceased couple, was originally booked on KAL's flight KE 704, scheduled to depart from Tokyo at 1.30pm. and to arrive at Seoul at 3.40pm. on 15 October 1978, but before its members left Kuala Lumpur on the tour, E their tickets were endorsed with confirmation of change of flight to flight KE 001, scheduled to depart from Tokyo at 5.30pm. and to arrive at Seoul at 7.30pm on the same day.

Wing Wah knew when booking the flight that there would be a curfew in Seoul from midnight at the close of 15 October, but they were satisfied that, even allowing for some take off delay at Tokyo, the group would have F sufficient time to clear customs and reach before midnight the Sheraton Walker Hill Hotel ('the Sheraton') in Seoul where accommodation had been booked for its stay.

On 29 September, the KAL office in Kuala Lumpur telexed to the KAL offices in Tokyo and Seoul information as to the group's travel itinerary, G which included the information that the group would be traveling from Tokyo to Seoul on 15 October on KE 001, that the group would be staying in Seoul at the Sheraton and that Wing Wah's handling or ground agent in Seoul for the group was Lotte Travel Service Ltd. ('Lotte'). Wing Wah's witness, Ng Lay Tin, said that it was the practice with all airlines to provide such information service for a tour agency where tour groups were H concerned, so that, for instance as in this case, KAL in Seoul could inform Lotte of any change in the time of arrival.

On 3 October, Wing Wah wrote to Lotte to inform them that the group of 23, which was given the number WWT 0310, would be travelling from Tokyo to Seoul on 15 October on KE 001, but Lotte were not to receive the message, which was air-mailed and postmarked 4 October, until I 18 October, and the group and Lotte were fated not to meet in Seoul on 15 October.

What happened on Lotte's side was related by Mr Wu, Shyuz-Bin, an assistant manager of Lotte in charge of the group, and Wing Wah's witness. Not having received information about the change of flight from KE 704 to KE 001, and acting on the information he had that the group would be arriving on flight KE 704 at 3.40pm, he appointed a tour guide, Ms Woo, Young Li, to welcome the group at Seoul's Kimpo Airport. A motorcoach was also sent to the airport to transport the group to the Sheraton.

At 6pm, Ms Woo telephoned Mr Wu to say that since she arrived at the airport at 3.20pm she had not sighted the group. Mr Wu, knowing that there would be another KAL flight from Tokyo, flight KE 001, made enquiries with KAL in Seoul about the group and was informed that the flight would land at 8.15pm but that the group was not on the flight. Mr Wu also attempted to communicate by telephone with Wing Wah in Kuala Lumpur but was not successful.

Mr Wu told Ms Woo, who had telephoned Mr Wu several times, to wait for Cathay Pacific flight CX 450 in case the group should be on it. Miss Woo telephoned at 8pm to say that the group was not on it. Mr Wu then told Ms Woo to leave the airport with the coach and go home and wait for his call. Mr Wu explained in evidence that he did not ask Ms Woo to await the arrival of KE 001 at 8.15pm because he believed the information which he said he had obtained from KAL that the group was not on it.

The fact was that the group arrived at the airport at about 8.26pm on flight KE 001 after Ms Woo presumably had left. It did not arrive at 7.30pm as originally scheduled because there had been a delay in departure at Tokyo. Had Mr Wu not had such complete trust in the information that he said he received from KAL in Seoul that the group was not on the flight, he would, judging from his explanation, have asked Ms Woo to wait for flight KE 001, and the group, unless fated otherwise, would have been met at the airport and transported to the Sheraton.

The rest of Mr Wu's narrative concerns his efforts to find the group. Not receiving further information about the group, he left his office at about 9.40pm for home with instructions to the night duty officer to contact Mr NT Lee, Lotte's assistant general manager, if anything should turn up about the group before he reached home.

At 10.40pm, Mr Lee telephoned Mr Wu at his house to say that he had received a call from the tour leader, Ms Jenny (Chan Yan), from the airport and to instruct Mr Wu to get a coach and tour guide ready. Mr Wu telephoned the depot to ask for a coach and driver to be ready but the depot later telephoned him to say that no driver was available as everyone had gone home because of the curfew which was coming at midnight. At 11.05pm, Mr Lee telephoned Mr Wu again with instructions to go immediately to meet the group who was then at the restaurant outside the main gate of the airport. Mr Wu took a taxi to the depot, arriving at 11.15pm. A coach was waiting. He drove it to the restaurant. When he arrived at 11.50pm at the restaurant, he found it was closed and in darkness. After looking around he did not find anybody there. The curfew had started, but he made enquiries at the nearby police station, he went to the

airport terminal, he made calls to hotels in the vicinity of the airport and in the city, including the Sheraton, but he failed to locate the group. He waited in the coach near the police station until 4am., when the curfew ended, and made a search from hotel to hotel. Finally he returned the coach to the depot at 8am.

That is the outline of Mr Wu's evidence.

What befell the group was related by Mr Kim Pong Ok, KAL's witness, who was then a supervisor in the departure hall at Kimpo Airport. After the airport had closed at 10pm, he was on his way home when he was stopped by an airport policeman who asked him to take some stranded passengers out of the airport and leave them at the Koryo Jeong Restaurant, which was in front of the front gate of the airport, where a coach from Lotte, whom the policeman said he had contacted, would come and pick them up. So they were transported to the restaurant in a KAL commuter bus, in which were also four KAL staff, including Mr Kim. They arrived at the restaurant at about 11.25pm. The restaurant was closed. The Lotte coach was not there. They waited for the coach. Because everyone was tired and the children were feeling cold, Mr Kim prevailed upon the restaurant to let them in, which they did. Mr Kim went out on foot to inquire about hotel accommodation, but no rooms were available. He came back to the restaurant, when the tour leader suggested that enquiries be made at nearby inns. Mr Kim and two colleagues went on foot to the inns. At last they found an inn, the Eun-ha Inn, which had six rooms available. The tour leader agreed to go there. So they all went to the inn, which was about 50m from the restaurant, on foot. arriving at about 12.15am on 16 October. Mr Kim told one of his colleagues to ask the police station to inform the Lotte coach driver of the whereabouts of the group. So rooms were secured for the group at the inn for the night. Mr Kim and his colleagues could not go home because of the curfew. They had to stay at another inn because there was no more room at the Eun-ha Inn.

After the group had checked in at the inn, one of Mr Kim's colleagues telephoned Lotte from the inn to inform them that the group was at the inn, but Mr Kim could not remember the time of the call.

At about 6am on 16 October, Mr Kim was back at the inn. Shortly afterwards, four persons occupying one room were found unconscious in the room with symptoms of gas intoxication.

That is the outline of Mr Kim's evidence.

Two of the four persons were the deceased couple. The cause of their deaths was certified to be coal briquet carbon monoxide gas poisoning.

As I feel that it is fitting at this stage to state straight away what caused the carbon monoxide poisoning, and as the cause is to be found in certain evidence that the plaintiffs in their written submission seek to use against KAL, I shall proceed to deal first with that evidence and then with the plaintiffs' case against KAL, which is only one of negligence, the plaintiffs having decided not to pursue with the pleaded cause based on breach of contract.

The plaintiffs have not called any witnesses to testify as to the happenings in the night between 15 and 16 October 1978. They therefore seek to rely on three reports as being more reliable than the evidence of Mr Kim Pong Ok. P4 is the report dated 19 October 1978 to Wisma Putra, the Malaysian Ministry of Foreign Affairs, from En Mohd Noor bin Hashim, one of the witnesses for the plaintiffs, who was then the Third Secretary, Administration and Consular, at the Malaysian Embassy in Seoul. The report was prepared from interviews with certain personnel of Lotte, of Wing Wah (including the tour leader, Ms Chan Yan), of the Korean Tourist Association, of KAL, and of the police station at the airport. P5 is Lotte's statement to the Malaysian Embassy, dated 18 October 1978. In bundle P9 is an undated report from Ms Chan Yan, the tour leader and Wing Wah's employee. Those are the three reports that the plaintiffs seek to rely on. Bundle P9 is a bundle of documents that the second plaintiff received from Wisma Putra.

The plaintiffs also produced P7, which is a letter dated 26 October 1978 from En Mohd Noor to Wisma Putra forwarding, among other things, a copy of the police report from the Kangso-gu Police Station and the passports and personal effects of the deceased couple, and giving certain additional information. The police report is one of the documents in bundle P9. It was admitted by consent as P11 A-C, because it consists of three sheets or parts, each entitled, as translated, 'Fact of Crime', see notes, page 26 C. It contains information about the cause of the presence of carbon monoxide in the inn.

Those reports and the letter are hearsay, in that they are, or are based on, statements of persons who did not appear and testify. To the best of my recollection, they were admitted as exhibits on the understanding that the admissibility or probative value of their contents would be subject to submission and consideration. In para 4.2.2 of their written submission, the plaintiffs give reasons why the evidence contained in exhs P4, P5 and P9 should be preferred to the evidence of Kim Pong Ok, but they have not suggested any legal ground or principle that would justify the admission of the contents of the documents as evidence. As far as those contents are sought to be used as evidence adverse to KAL, I am not able to see how in law I could justify their admission as evidence. I therefore rule that they are inadmissible in evidence as evidence against the interests of KAL, but as regards the cause of the presence of carbon monoxide in the inn that is given in the police report, I shall accept it as evidence on the basis that it being evidence produced by the plaintiffs themselves which, as will later be seen, is detrimental to them, it is an admission against their interests on their part.

It is not easy to get a clear understanding from the English translation of the three 'Fact of Crime' documents P11 A-C of what actually happened but it would appear that the operators of the inn had had the heating system of the room in question changed 'from roller style coal briquet fireplace to hot water circulation style', but the finishing work that had to be done to the room after the change had been of an inferior quality so that, in the cement finishing beside a water tank and at both sides of a window, there were cracks through which carbon monoxide gas seeped into the room.

Even if the contents of exhs P4, P5 and P9 were to be admitted as evidence, from the plaintiffs' written submission it appears that the evidence from those exhibits that the plaintiffs seek to rely on is only evidence that the employees of KAL, who were involved in transporting the tour group from the airport to the restaurant, knew that its members were to be accommodated at the Sheraton as against the evidence of Mr Kim Pong Ok that none of them, not even the tour leader, knew where the group was to be accommodated. But, as I shall subsequently show, the plaintiffs in their written submission make but unavailing use of the evidence of that knowledge to establish KAL's liability in negligence.

Reading their written submission, I get a distinct impression that the plaintiffs are not certain as to how to formulate a duty of care on the part of KAL. Nowhere previously in their written submission do they expressly say that KAL owed a duty of care to the deceased couple to transport them to the Sheraton, but in para 4.3.8 they argue that even if KAL's employees did not know that the tour group was to be accommodated at the Sheraton, those employees' conduct in waiting at the restaurant with the group, in searching for accommodation for its members and in eventually housing them at the Eun-ha Inn suggest an undertaking by those employees to act in the best interests of the deceased couple. They therefore conclude in para 4.3.9 that those employees of KAL owed a duty of care to the deceased couple to ensure that they were accommodated at a place or hotel that was safe for habitation. The corollary is that if KAL's employees had left the group to their fate at the restaurant, they would have owed no duty of care to the deceased couple. To find that a duty of care arises in such circumstances is to propose that the greater the length one goes to in endeavouring to help someone, the greater is one's liability to be attached with a duty of care to him to ensure, as a matter of undertaking, that the help given ends in safety. No authority has been cited for such a proposition and it does not strike me as a correct proposition. It is unacceptable because it would discourage the rendering of succour to those in distress.

As to where the breach in such duty of care lay, in para 4.3.10 of their written submission, the plaintiffs claim that it lay in the KAL employees' accommodating the deceased at the Eun-ha Inn when they knew or should have known that it was not safe for accommodation. There is no evidence that the KAL employees knew or should have known that it was not a safe accommodation. On the contrary, the evidence of the police report as to the cause of the presence of carbon monoxide in the fateful room of the inn — and this is why I said that the evidence is adverse to the plaintiffs' interests — is prima facie proof that those employees could not have known that there was or was going to be presence of carbon monoxide in one of the rooms of the inn. In fact, there is evidence that those employees themselves, or some of them, would have stayed at the inn too had there been any more room to accommodate them.

I find, therefore, that the plaintiffs have not proved that KAL's employees owed the suggested duty of care to the deceased couple and that, even if they did owe such a duty of care, they had not breached it. Therefore it follows in any event that the plaintiffs have failed to prove their case

against KAL. Let me, however, state how the plaintiffs seek to make KAL vicariously liable for those employees. In para 4.4.2 they accept that the employees were technically 'off-duty' but they maintain that nevertheless they were acting in the course of their employment. Their reason for so maintaining is given in para 4.4.3, where they reason that since the arrival of flight KE 001 was delayed by one hour and the curfew was going to begin at midnight, 'it was the responsibility of the second defendants as an airline to provide transportation for the passengers to their Hotel' and therefore KAL would have authorized the acts of the employees in searching for accommodation for the group, making them acts in the course of employment. The words as to responsibility that I have placed in quotes are the foundation on which the conclusion as to authorization is based. It is in those words as to responsibility that is to found a faint indication of an attempt to make use of the evidence of knowledge on the part of those KAL employees that the group was to be accommodated at the Sheraton, that is the evidence from the reports and letter that I said before are inadmissible. But the plaintiffs have not argued on what legal principle would such a responsibility arise in those circumstances. If there was no such responsibility in normal circumstances, on what legal principle would such a responsibility arise in the given circumstances? The foundation for the conclusion as to authorization is an unsound foundation and the conclusion on which it is based cannot stand.

In para 4.4.5 of their written submission, the plaintiffs seem to attempt another ground on which to found liability on KAL's part. I quote the paragraph:

> Yang Arif, it is our submission that the employees of the second defendants were guilty of professional incompetence in that the employees had misinformed Lotte Travel Services that the said 23 passengers, including both the deceased persons could not be located on the flight passenger list albeit the second defendants, vide exh 2 ABD para 7, had been informed by the Korean Airlines Reservation Department in Kuala Lumpur of the names of the passengers on Korean Airlines Flight No KE 001, the telephone number of its overseas agent and the hotel that the group had reservations in.

The plaintiffs, however, do not say whether their case arising from the misinformation is also a case of negligence and they have not argued how the requirements for the tort of negligence based on the misinformation have been satisfied. At any rate, no case based on the alleged misinformation has been pleaded. For those reasons, I shall not take it into consideration.

I conclude that the plaintiffs have failed to prove their claim against KAL and the claim must be dismissed.

I turn now to consider the plaintiffs' case against Wing Wah, which as I have said, is one of breach of contract and negligence.

As for breach of contract, it is not disputed that the contract, which in the statement of claim is termed 'Tour Agreement', comprised Wing Wah's holiday brochure entitled 'Wing Wah Holidays' (exh P1) and itinerary (B) therein. The brochure contains the following exemption clause:

> Wing Wah Travel Agency Sdn Bhd and its associates or agents *acts only in the capacity of an agent* upon the legal conditions that while exercising every possible care in making the tour arrangements, *it shall not be liable for any injury*, damage loss, additional expenses, accidental delay or other irregularity *which may be caused either through wilful or negligent acts* or commission *on the part of companies or individuals* providing or engaged in transportation, accommodation or other services relating to the execution of the tour or through natural calamities or Government Regulations, strikes and *other factors beyond its control.* (Emphasis added.)

In their written submission, the plaintiffs argue that Wing Wah committed two breaches of contract. One was in the belated arrival of flight KE 001 at Kimpo Airport at 8.26pm instead of at 7.30pm as scheduled. The second breach was in the absence of reception for the deceased couple at the airport and in accommodating them at the Eun-ha Inn, see paras 3.1.3 and 3.1.4. The breach alleged in para 3.1.4, that is the second breach, is founded on a term of the Tour Agreement, as alleged in para 3.1.2 (b), that:

> Both the deceased persons ... would be received on arrival in Seoul Airport and transported to and be accomodated [sic] in the ... Walker Hill Sheraton Hotel.

I shall deal with the second alleged breach first. The term stated in that paragraph did not materialize. The deceased couple were not received on arrival at the airport and they were not accommodated at the Sheraton, but that was not because of any lack of arrangement on Wing Wah's part.

Arrangements had been made for Lotte to receive the group at the airport and Lotte did go to the airport to receive it. Arrangements had also been made for its accommodation at the Sheraton. The arrangements did not materialize for the group and the deceased couple because Wing Wah's communication to Lotte about the group's change of flight from Tokyo was not received in time by Lotte. As has been related, it was sent on 14 October but received by Lotte only on 18 October, three days after the event. Had Lotte received the information, Ms Woo would have been sent to the airport with flight KE 001 in mind, and although in the event it was delayed Ms Woo would have waited for its eventual arrival. She would have met the group, and the group, in good time, would have been transported to the Sheraton and accommodated there. As it was, although Mr Wu knew that there would be a flight KE 001 on that day, he did not know that the group was on that flight and he did not instruct Ms Woo to wait for that flight in case the group should be on it because he had been informed in his enquiries with KAL that the group was not on the flight. I have no doubt, after hearing the evidence of Mr Wu, that he had done everything possible that night to trace the group and that there was no failure on his or Lotte's part that he was trying to conceal. I therefore accept his evidence that he made enquiries about flight KE 001 and was informed that the group was not on the flight.

There were, therefore, two factors that operated to prevent Lotte meeting the group at the airport, namely the non-receipt in time of Wing Wah's communication about the change of flight and Mr Wu's being

informed by KAL that the group was not on flight KE 001. Those factors were factors beyond Wing Wah's control and the exemption clause applies to render them not liable for the consequences thereof on the deceased couple.

It may be suggested as a matter of breach of contract, because it is raised in the submission as to negligence, that Mr Wu should not have believed the information that the group was not on the flight and should still, despite the information, have instructed Ms Woo to wait for flight KE 001. One reason for the suggestion may be that Mr Wu, a man of great experience in the tour business, had obtained the information from a KAL source that was not properly in a position to give the information. I believe that Mr Wu cannot be faulted. I believe that with his experience, he reasonably believed the information to be true and, so believing, it was pointless for him to ask Ms Woo to still wait for flight KE 001. But even if there was any blameworthy failure of judgment on Mr Wu's part, the exemption clause applies to render Wing Wah not liable for its consequences on the deceased couple. According to the exemption clause. Lotte, Mr Wu's employer, and Mr Wu were a company and individual 'providing or engaged in transportation relating to the execution of the tour'.

As to the delay in flight KE 001, Wing Wah clearly cannot be liable for it because, according to the exemption clause, it was a circumstance beyond their control and also, if it was KAL's fault, it was the fault of a company 'providing or engaged in transportation'.

In para 3.1.12 of their written submission, the plaintiffs argue that Wing Wah would be liable for the loss of the lives of the deceased couple since their deaths 'were a direct consequence of the first defendants' breach of the said Tour Agreement'. If the group's delayed arrival in Seoul and their not being met by Lotte at the airport constituted breaches of the Tour Agreement on the part of Wing Wah, in my judgment, the deaths of the deceased couple were far from being a direct consequence of the breaches. Their deaths were caused by an entirely alien factor, that is the presence of carbon monoxide in the inn owing to circumstances that have been set out as related in the police report.

For those reasons, the plaintiffs fail against Wing Wah on breach of contract. I proceed now to consider the plaintiffs' case against Wing Wah for the tort of negligence. In para 3.2.3 of their written submission, the plaintiffs state Wing Wah's duty of care to the deceased couple as 'a tortious duty of care as to both the deceaseds' safety in the carrying out of the Tour Agreement ...'. Paragraph 3.2.5(a) alleges, as a breach of that duty, failure to ensure that the deceased couple arrived in Seoul at 3.20pm and causing them to arrive at 8.26pm without proper arrangement being made for their accommodation in Seoul. As has been seen, 3.40pm would have been the arrival time of the original flight KE 704, but the flight had been changed before the tour started to KE 001, originally due to arrive in Seoul at 7.30pm. Any delay in the flight should not be answerable for by Wing Wah because they had no control over flights and flight operation. As to

accommodation, proper arrangements had been made for accommodation at the Sheraton.

Another breach is alleged in para 3.2.5(b), that is failure to accommodate the deceased couple at the Sheraton but instead causing them to be accommodated at the Eun-ha Inn 'which the first defendants knew or ought to have known was not safe for accommodation'. I reject the allegation that Wing Wah knew or ought to have known that the inn as not safe for accommodation. That allegation could only be made on the basis that it was the tour leader, Ms Chan Yan, Wing Wah's employee. who caused the group to be accommodated at the inn when she knew or ought to have known that it was not safe for accommodation. For the same reasons that I gave in respect of KAL, I reject the allegation that the tour leader knew or would have known of the presence of carbon monoxide in the room that the deceased couple were to occupy.

In para 3.2.6, the plaintiffs allege breach of Wing Wah's duty of care in that they failed to make adequate arrangements with Lotte to ensure the deceased couple were met on arrival in Seoul and transported to the Sheraton. I find there was no failure in that respect because the evidence is that Wing Wah had done all that was reasonable to ensure that the deceased couple were met on arrival, but their letter informing Lotte of the change of flight was not received by Lotte before the event.

In paras 3.2.7 and 3.2.8 there is an allegation of professional negligence on the part of Lotte, for which Wing Wah are said to be vicariously liable, in that, even though KAL had told Mr Wu that the group was not on flight KE 001, flight KE 001 should nevertheless have been checked. This point is not pleaded and should not be raised. In any event, I have already stated that it was not unreasonable for Mr Wu to believe the information he received from KAL, and believing it, it was not unreasonable for him not to check that flight.

The case of negligence against Wing Wah must in any case fail even though there was breach of duty of care on their part, because the deaths of the deceased couple were not a reasonably foreseeable consequence of the breach.

I dismiss the plaintiffs' claims against Wing Wah and KAL with costs.

Plaintiffs' claims dismissed with costs.

Reported by Lim Lee Na